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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1078

A. SEARLE PINNEY, J. TYLER PATTERSON, JR., FREDERICK POPE, JR., AND PETER P. MARIANI

Appellants

vs.

OLIVER BUTTERWORTH, MIRIAM BUTTERWORTH, S. RAINS WALLACE, ROBERT BEACH, CHARLES JACOBSON, DAVIS S. MACLAY, BRADLEY MOREHOUSE, JOHN NORMAN, GEORGE LUCAS AND ALBERT E. HOLLAND,

Appellees

On Appeal from the United States District Court for the District of Connecticut

MOTION TO AFFIRM

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Appellees in the above-entitled case move to affirm. Appellees cannot now say that the questions presented by this case are so unsubstantial as not to require further argument; but appellees believe that several cases awaiting decision by this Court involve similar questions, and if decided before argument of this case, may be dispositive of the issues here. For example, even if the issues before this Court in this case are framed in the most favorable manner to appellants, decisions in *Lucas* vs. *Forty-Fourth General Assembly of Colorado*, No. 508 this Term, or *Maryland Committee for Fair Representation* vs. *Tawes*, No.

29 this Term, that the patterns of apportionment there involved violate the Equal Protection Clause of the Fourteenth Amendment, will remove any substantial question from this case.

QUESTIONS PRESENTED

The appellees take this opportunity of stating what they believe to be the issues presented by this case, as follows:

1. In light of the existing distribution of population in Connecticut, if the Connecticut Senate were apportioned solely on the basis of population, does Article Third, Section 3 of the Constitution of Connecticut violate the Equal Protection Clause of the Fourteenth Amendment?

2. In light of the existing distribution of population in Connecticut, if the Connecticut Senate were apportioned solely on the basis of population, would a system of one representative per town in the House of Representatives violate the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT

The appellees think it important at the outset that this Court understand what the system in Connecticut is and what it results in. The following statement is taken substantially from the draft opinion of the late Judge Charles E. Clark, which opinion was attached as an appendix to the opinion of the Court below. See the Appendix to the Jurisdictional Statement of Appellants, pp. 24-29 (hereinafter cited as "Appendix").

Connecticut has a bicameral legislature. The provision relating to the Connecticut Senate provided that in forming Senatorial districts "regard shall be had to population in the several districts, that the same may be as nearly equal as possible under the limitations of this section. Neither the whole or a part of

one county shall be joined to the whole or a part of another county to form a district, and no town shall be divided, unless for the purpose of forming more than one district wholly within such town, and each county shall have at least one senator." Power to redistrict the Connecticut Senate was lodged in the general assembly "next after the completion of a census of the United States. . . ." The exercis such power has been construed by the Connecticut Supreme Court of Errors as permissive, not mandatory. *Cahill* vs. *Leopold*, 141 Conn. 1, 103 A.2d 818 (1954). Disparities in population between the most populous and the least populous district, in the Senate, have reached the order of eight to one. In the case at bar, the lower Court indicated that the Connecticut Senate must be redistricted and that the limitations set forth in Article Third, Section 5 of the Connecticut Constitution could not be regarded as arbitrary limitations on the framing of new Senatorial districts. As yet, the Connecticut Senate has not been redistricted.

Although the appellants were content that the Connecticut Senate should be held to be unconstitutionally districted, apparently the Connecticut House is for them on a different footing. As Judge Clark pointed out in his opinion below, "the unit principle in what we must assume as its purest form of one representative to each town has never been the law of this State." (Appendix, p. 27) The Constitution of Connecticut, as adopted in 1818, provided that in the House existing towns should have the same number of representatives "as are at present practised and allowed; new towns, formed after the adoption of the Constitution, should have one." By constitutional amendment in 1874, every town having more than 5,000 persons was given two representatives, and in 1876 the requirement was added that new towns must have a population of at least 2500 before becoming entitled to one representative. The practical results of this pattern are that towns in existence be-

fore 1818, no matter what their population, have two representatives: thus Union, with a population of 383, has two representatives, as does Hartford, with a population of 162,178. Madison, with a population of 4567 persons, or more than ten times that of Union, was formed after 1818 and hence has only one representative. It is not hard to understand why not one of the four judges who considered the matter in the lower Court was able to find any currently relevant and rational justification for the system as it presently exists.

But the appellants apparently cling to the notion, even in this Court, that the system set forth in the Connecticut Constitution embodies the principle of "unit representation"; and they argue from the "federal analogy" that if one house of a bicameral legislature is (or will be) apportioned on the basis of population, anything at all may be done in the other house, even to the point of allowing a stranglehold on the legislative process to be applied by a very small segment of the population. The statistics of malapportionment in Connecticut, as cited by Judge Clark, are striking: 11.9 per cent of the population elects a majority of the House; 119 of the 169 towns represented in the House have populations per representative 25 per cent or more below the "norm" (the figure arrived at by dividing the population of the State by the number of representatives). These towns have a population of 20.5 per cent of the population of the State but elect 194 representatives, or 66 per cent of the House. The disparity between the most populous town, Hartford, with a population of 162,178, and the least populous town, Union, with a population of 383 is on the order of 424.5 to one. And as Judge Clark observed, the malapportionment is becoming worse. (Appendix, pp. 28-29)

In the lower court, appellees chose to meet these appellants on their own ground — that is, that a system of pure unit representation, if it existed and derived some kind of sanction from

the Connecticut Constitution, which it does not, would be offensive to the Fourteenth Amendment in that in Connecticut it would produce substantial disparities from representation by population without any relevant or rational justification. Essentially, this is the question which was argued in and decided by the lower Court. It is somewhat distressing at this point to find the appellants seeking to change the question. Disregarding the argumentative nature of the questions proposed by the appellants, we feel we must point out that the second question offered by them, as phrased, is simply not in the case. This question asks whether the Fourteenth Amendment permits each town to have at least one representative in the House. Such a body would not necessarily involve disproportionate representation. Union could have one representative and Hartford 424, for instance. Appellants' question two thus introduces a basic problem of the dynamics of legislatures — how large a body can work effectively — but it does not articulate a constitional dispute involved here. For no claim nor decision in this case, except for some general remarks by Judges Clark and Smith to the effect that the largest convenient unit might be around 300 members for the House (see Appendix, pp. 23, 34), would violate the "principle that each town shall be entitled to at least one representative in the House of Representatives."

In addition, both appellants' questions one and three hinder rather than aid the presentation to this Court of the scope of the controversy. Question one includes the language "in view of the fact(s) that . . . there are reasonable bases in support of a legislative system so composed [the existing House system]." The implication that some Court or judge in this case has found *as a fact* that there is any reasonable basis for the existing House is simply wrong. See Appendix, p. 11 (Judge Timbers), p. 23 (Judge Smith), p. 29 (Judge Clark), p. 39 (Judge Anderson). And the third question attempts to put appellees in the position

of attacking as unconstitutional any apportionment of the House which is not strictly according to population, while throughout this case, commencing with their brief in support of a Motion for Summary Judgment, filed March 13, 1963, the appellees have only complained about straying from population as a standard in so far as such departures are for reasons, if any, which are not currently relevant.

Respectfully submitted,

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